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(3)

No. 08-915

In The

Supreme Court of the United States

VALERIE MINER, DAVID MINER,
ALEXANDER TUPAZ and LOURDES TUPAZ,

Petitioners,

v.

CLINTON COUNTY, NEW YORK, and JANET DUPREY,
in her individual capacity and in her official capacity
as Clinton County Treasurer,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF FACTS

Respondents, Clinton County and Janet Duprey, submit this Brief in Opposition to the Petition for a Writ of Certiorari and submit that the Petition be denied in its entirety and that the Decision of the Second Circuit should not be disturbed.

Petitioner's Statement of Facts contains a number of misstatements and material omissions that must be addressed.

1. *Tupaz v. Clinton County*

The Tupazes owned two adjacent vacant properties in Clinton County and were delinquent in their obligation to pay their 2002 property taxes. Prior to the foreclosure in question, the Tupazes had been the subject of two foreclosure proceedings. As in this matter, the Tupazes denied receiving those notices, although signed certified mail receipts were returned on each occasion. The certified receipts from the prior foreclosures also contain illegible marks that the Tupazes deny are theirs.

Within the year prior to the foreclosure proceeding in question, the County mailed the Tupazes at least four separate notices advising them that they had not paid their taxes and warning them that a foreclosure action would be commenced if their taxes were not paid. Each letter was mailed to Tupazes' correct address and was not returned as undeliverable. The Tupazes admit receipt of a bill that

contained a "Notice of Arrears" statement, but maintain that they did not read it.

The Notice and Petition of Foreclosure in question was mailed to the Tupazes by certified mail, the means of notice required by New York State Real Property Tax Law § 1125. The Petition stated that the deadline for redemption was January 16, 2004, and that if they failed to pay their taxes or oppose the Petition by that date, they would lose their title to their property. There is no dispute that the address used by the County was the Tupazes' correct home address.

Records from the U.S. Postal Service reflect that the Notice and Petition was delivered to the Tupazes' address on October 16, 2003 at 2:46 p.m. An unknown person acknowledged receipt of the Notice by making a mark on the green receipt attached to the envelope. That signed green receipt card was returned to the Clinton County Treasurer's Office to confirm that the Petition had been delivered and received. Pursuant to Postal Service procedures, had the mailing been undeliverable or unclaimed, the entire Petition would have been returned; because only the receipt was returned, the County knew that delivery had taken place.

When that signed receipt was returned, the Treasurer's Office promptly checked the U.S. Post Office website and utilized the "Track and Confirm" service to confirm delivery. The County Treasurer has testified that a clerk in her office checked the Track

and Confirm service *immediately* after the receipt was returned, not, as suggested by Petitioners, several months later. The reference to "April 21, 2003" (Petition, pg. 5, 17) reflects only the date that the County *printed* the receipt, after the County learned that litigation would arise.

Because the Tupazes failed to oppose the Petition, a default judgment was entered in favor of the County on February 20, 2004. The Tupazes did not call the County to inquire into the foreclosure until March 31, 2004. The County Treasurer has testified that until that time, the County had no reason to question delivery and receipt of the Petition. Several months later, the Tupazes filed a motion in County Court to vacate the foreclosure. Their motion was denied as untimely and meritless. The Tupazes then appealed to the New York State Appellate Division, Third Department. The Appellate Division affirmed the County Court Decision. *Tupaz v. Clinton County*, 17 A.D.3d 914 (3d Dept. 2005).

The Tupazes then commenced the underlying action. In January, 2006, the Northern District Court of New York granted summary judgment in favor of the County and dismissed the Complaint in its entirety. The Tupazes then appealed to the U.S. Second Circuit Court of Appeals. Shortly thereafter, the U.S. Supreme Court rendered a Decision in the unrelated case of *Jones v. Flowers*, 547 U.S. 220 (2006), which addressed the constitutionality of an Arkansas foreclosure statute. In light of that Decision, the Second Circuit remanded this matter back to District Court

to evaluate whether its prior Decision was effected by *Jones*. In particular, the Second Circuit specifically directed the District Court to consider (1) the effect of the fact that the Tupazes had presumably received prior warning letters and (2) whether the County believed that the Tupazes had received the Notice. *Luessenhop/Tupaz v. Clinton County*, 466 F.3d 259 (2d Cir. 2006).

The parties each submitted proof to the District Court on the identified issues. In June, 2007, the District Court again granted judgment in favor of the County. The Tupazes appealed again to the Second Circuit, and consolidated that case with the matter of *Miner v. Clinton County*.

2. *Miner v. Clinton County*

The *Miner* action arises out of foreclosure of a vacant parcel of land in Clinton County, due to the Miners' failure to pay their 2004 and 2005 property taxes. The Miners were mailed *nine* warning letters and notices which reminded them of their delinquency and advised them that a foreclosure action would be commenced if the taxes remained unpaid. The Miners *admit* receipt of most of those notices, but did not pay their taxes or contact the County.

On October 7, 2005, Clinton County sent a Notice and Petition of Foreclosure to the Miners by certified mail. That Notice indicated that the redemption deadline was January 13, 2006, and that if they failed

to pay their taxes or oppose the Petition, they would lose their property.

There is no dispute that the Notice was mailed to the Miners' correct address and that it was *actually received* by Mrs. Miner. She has admitted that she signed the certified mail receipt and read and understood the Petition.

On the day that she received the Notice, Mrs. Miner called the Treasurers' Office to inquire into the amount of taxes due and the status of the foreclosure proceeding. She was again advised of the deadline and the risks of non-payment. Nonetheless, the Miners *still* failed to pay their taxes.

Mrs. Miner called the Treasurer's Office several times within the days immediately before that deadline. On each occasion, she was reminded of the deadline and advised that she would lose her property if her taxes were not paid. Nonetheless, the Miners *still* failed to pay their taxes. As a result, a default Judgment and Order of Foreclosure was entered in favor of the County.

Following the default judgment, the Miners moved to vacate the default Judgment. That motion was denied by Clinton County Court, upon the grounds that they had failed to demonstrate any excuse for their delay and default. The Miners then appealed that Decision to the New York State Appellate Division, Third Department. In April, 2007, the New York State Appellate Division affirmed the dismissal. *Clinton County v. Miner*, 39 A.D.3d 1015

(3d Dept. 2007). In addition, the Miners commenced an action in federal court. In April, 2007, the District Court dismissed that action as well. As noted above, the *Miner* Decision was then appealed to the Second Circuit in conjunction with *Tupaz*.

The consolidated *Tupaz* and *Miner* appeals were argued before the Second Circuit in May, 2008. In September, 2008, the Second Circuit affirmed the Decisions of the District Courts in both matters. *Miner/Tupaz v. Clinton County*, 541 F.3d 464 (2d Cir. 2008). The present appeal ensued.

The Petitioners' properties have not been offered at public auction and are being held by the County pending a final resolution of these matters.

REASONS FOR DECLINING TO GRANT THE PETITION

It is respectfully submitted that the Petition for a Writ of Certiorari should be denied in its entirety and that the Decision of the Second Circuit should stand. No compelling reasons exist to grant the Petition and hear this case. The issues which the Petitioners raise are not novel, unique, nor a subject which has caused prior conflict between the various Circuit Courts. The Second Circuit's **unanimous** Decision is *not* in conflict with a Decision from this Court or from any United States Court of Appeals. To the contrary, the Decision is entirely *consistent* with all relevant precedent and was premised upon well-settled principles of

law consistently applied and upheld by the courts. In addition, the Decision is fully supported by the facts established in the Record.

As a result, the Petition for a Writ of Certiorari should be denied.

POINT I

THE SECOND CIRCUIT PROPERLY CONCLUDED THAT THE CLAIMS FOR ANY SURPLUS LACK MERIT AND MUST BE DISMISSED.

The lower courts correctly concluded that the Petitioners lost all interest in their properties following their defaults and that they have no right to any surplus that the County might realize when the properties are auctioned.

At the onset, it should be noted that the neither party has *standing* to raise this particular issue. As correctly noted by the Second Circuit, "it is likely that the Tupazes do not have standing because the Tupazes' properties have not been sold and there is no indication that a sale has occurred or is imminent." (App. 20, fn. 7) To date, *neither* property has been offered at public auction. Therefore, the Petitioners lack standing to bring this premature claim.

In addition, this particular issue is not properly before the Court on the Tupazes' claim, because they did not raise this claim in their Responses to the County's Interrogatories.

Even if the Petitioners had standing to raise this issue, it must still be dismissed as meritless. The fact that a property *might* one day be sold for more than the amount of taxes due is irrelevant. A surplus or loss is simply incidental to the foreclosure process. There is no legitimate basis in the Record for the Petitioners to maintain that the County was "motivated" to profit off of foreclosures. When a surplus is realized, it does not somehow go into the coffers of the Treasurer's Office, but is used for the benefit of the County as a whole, by reducing taxes, making civic improvements, etc. A county frequently suffers a loss at auctions as well. On occasions when the property is auctioned for less than the delinquent taxes, a county certainly does not have a right to pursue the defaulting taxpayer to recover its *losses*. As a result, claims for surplus have consistently been rejected by state and federal courts.

The matter of *Nelson v. City of New York*, 352 U.S. 103 (1956) is dispositive of this issue. In *Nelson*, as in the present matter, a foreclosure action was commenced due to non-payment of taxes. Although those plaintiffs denied knowledge of the foreclosure, the proof reflected that notices were mailed to their correct address. Due to their failure to oppose the foreclosure action, a default judgment was entered in favor of the City. Under the New York City Administrative Code, if a delinquent taxpayer timely asserted an Answer in the action, he may have a claim to any subsequent surplus. The *Nelson* plaintiffs failed to do so and did not raise any claim until long after the

redemption deadline had expired. The plaintiffs filed a motion, claiming a constitutional right to the surplus. Their motion, and subsequent appeals, were denied by New York courts, and the issue was eventually certified for the U.S. Supreme Court.

The Supreme Court ultimately concluded that the plaintiffs had not demonstrated a violation of due process or equal protection and had no right to any surplus. In particular, the Court held, "What the City of New York has done is to foreclose real property for charges four years delinquent and, in the absence of timely action to redeem or to recover any surplus, retain the property or the entire proceeds of its sale. We hold that nothing in the Federal Constitution prevents this where the record shows that adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings." *Nelson*, *supra* at 110.

That Decision has stood for fifty years and has consistently been upheld and applied. Generally, a taxpayer has an interest in any excess surplus from a foreclosure sale "only if the statue constitution or tax statute specifically creates such an interest." *Ritter v. Ross*, 558 N.W.2d 909, 912 (Wis. 1996). In *Ritter*, the Wisconsin Supreme Court relied upon *Nelson* and concluded that taxpayers were *not* entitled to recover any surplus – despite a "surplus" of over $17,000 – and held that, "when a state's constitution and tax codes are silent as the distribution of excess proceeds received in a tax sale, the municipality may constitutionally retain them as long as notice of the action

meets due process requirements." *Ritter, supra* at 912.

The Supreme Court of New Hampshire has affirmed that same principle, concluding that, "In the absence of contrary provision by statute or constitution, a municipality's title to such property is absolute, so that a town is free from either legal or equitable claims by a taxpayer to any surplus realized." *Spurgias v. Morrissette*, 249 A.2d 685, 687 (N.H. 1969).

Similar language appears in *City of Auburn v. Mandarelli*, 320 A.2d 22, 32 (Maine 1974), *appeal dismissed*, 419 U.S. 810 (1974). The Supreme Judicial Court of Maine rejected a former landowner's claim to a surplus, concluding, "In the absence of contrary provision by statute or constitution, a municipality's title to property acquired under the tax-lien-mortgage-foreclosure statute is absolute, and the city or town has no power to part with, nor duty to account for, any surplus value on any theory of 'equity and good conscience.'" *Mandarelli*, *supra* at 32.

Similar results have been reached by courts in Massachusetts (*Kelly v. City of Boston*, 204 N.E.2d 123 (Mass. 1965)); Oregon (*Reinmeller v. Marion County, Oregon*, 2006 WL 2987707 (Ore. 2006)); and Texas (*Booty v. State*, 149 S.W.2d 216 (Tex. 1941)).

The New York State Court of Appeals has also addressed this issue in *Sheehan v. County of Suffolk*, 67 N.Y.2d 52 (1986), *cert. denied*, 478 U.S. 1006 (1978). In that case, the Court concluded, "There is no

unfairness, much less a deprivation of due process, in the county's retention of any surplus," noting that under the NY RPTL, the delinquent taxpayers had had several years to pay their taxes or sell the properties. *Sheehan*, *supra* at 59.

See also: *Luessenhop v. Clinton County*, 378 F.Supp.2d 63, 73 (N.D.N.Y. 2005), *rev'd and remanded on other grounds*, 466 F.3d 259 (2d Cir. 2006), *Izzo v. City of Syracuse*, fn. 6, 2000 WL 122014 (N.D.N.Y. 2000), *aff'd*, 11 Fed. Appx. 31 (2d Cir. 2001).

The cases cited by the plaintiff are quickly distinguishable. The matter of *Thomas Tool Services, Inc. v. Town of Croydon*, 761 A.2d 439 (N.H. 2001) concluded that the particular "alternative tax lien" procedure in question violated the "takings clause" of the Constitution. Because that particular statute is dramatically different than the statute in question, and the plaintiff in this matter has not asserted a claim under "the takings clause," this case has no bearing. Both *Bogie v. Town of Barnet*, 270 A.2d 898 (Vt. 1970) and *City of Anchorage v. Thomas*, 624 P.2d 271 (Alaska 1981) concern statutes that specifically required that excess proceeds be returned to a taxpayer who properly moved for a surplus. Both cases are fact-specific and have no precedential value. Notably, *Bogie* makes no reference to *Nelson* at all, has not been positively cited by any federal court, and was specifically rejected by the Court of Appeal of Wisconsin in *Ritter*, *supra*. Similarly, in *Thomas*, the Alaska Supreme Court specifically noted that they

were *not* addressing her claims of due process, equal protection, or the issues raised in *Nelson*, *supra* at 274.

In contrast to those cases, the New York State Constitution and Real Property Tax Law does *not* provide defaulting taxpayers with an automatic right to recover any surplus realized. The Petitioners have not asserted any specific constitutional or statutory language that purport to provide them with that relief.

No New York statute specifically provides any interest or right in the surplus. To the contrary, New York provides a deadline by which the delinquent taxpayer loses all interest in the property. The New York State Real Property Tax Law mirrors the regulation at issue in *Nelson*. NY RPTL § 1110(1) provides that, "Real property subject to a delinquent tax lien shall be redeemed by payment to the enforcing officer, *on or before the expiration of the redemption period*, of the amount of the delinquent tax lien or liens, including all charges authorized by law." RPTL § 1131 further provides, "In the event of a failure to redeem or answer by any person having the right to redeem or answer, such person shall forever be barred and foreclosed of any right, title, and interest or equity of redemption in and to the parcel in which the person has an interest and a judgment of foreclosure may be taken by default as provided by § 1136(3) of this title. A motion to reopen any such default may not be brought later than one month after entry of the judgment."

To date, no court has ever held New York State's practice unconstitutional or declared that defaulting taxpayers always have an automatic constitutional right to recover a surplus. As in *Nelson*, these Petitioners were provided with notice of the foreclosure, were specifically advised of their deadline for redemption, and were provided with a statutory thirty-day deadline to move to reopen any default. The Tupazes failed to pay their taxes before the redemption deadline and did not move to vacate until ninety days after the Judgment had been entered. Although the Miners filed a motion within ninety days of the default judgment, that motion was properly denied by the County Court as they failed to demonstrate any merit for their claims or any excuse for their default.

Similarly, no claim for denial of equal protection exists. The proof reflected that Clinton County rejects *all* offers of late redemption and has not allowed *anyone* to share in any surplus realized. The Petitioners did not present any proof that any other county in New York State allows recovery of such a practice. The mere fact that a different statute regarding *private* mortgage foreclosures may allow for this certainly does not establish a claim of equal protection.

The Decision of the Circuit Court comports with *Nelson* and all applicable precedent. As in *Nelson*, *Ritter*, *Spurgias*, and *Mandarelli*, New York's laws are silent as to the distribution of the proceeds of any surplus. The Petitioners cannot rely upon any statute or constitutional language to claim to any surplus. In

addition, as noted below, the Petitioners received adequate notice of the foreclosure proceeding and ample opportunity to oppose it. Because they failed to do so, they lost any interest in the property or any claim of entitlement to any surplus realized. For the reasons set forth above, it is clear that the Decision of the Second Circuit was based upon accurate facts and case law and was in accord with all relevant precedent. Accordingly, the Court should decline to grant certiorari on this issue.

POINT II

THE SECOND CIRCUIT PROPERLY CONCLUDED THAT THE COUNTY SATISFIED ALL REQUIREMENTS OF DUE PROCESS BY DELIVERING A NOTICE TO THE TUPAZES' CORRECT ADDRESS BY CERTIFIED MAIL AND OBTAINING CONFIRMATION OF DELIVERY.[1]

By ensuring that the foreclosure notice was mailed to the Tupazes at their proper address and confirming that it had been delivered, the County has satisfied its due process obligations for provision of notice.

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[1] It should be noted that this issue pertains *only* to the Tupazes. The Miners have admitted receipt of the foreclosure Notice and acknowledge that they signed the certified mail receipt and read the foreclosure Notice in full.

The courts have consistently held that all due process requires is notice "*reasonably calculated* under all circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), *Jones v. Flowers*, 547 U.S. 220 (2006), *Weigner v. City of New York*, 852 F.2d 646 (2d Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989).

The courts have also concluded that due process does *not* require that a property owner receive actual notice before the government may take his property. *Jones*, *supra*, *Mullane*, *supra*, *Weigner*, *supra*. Notably, in *Weigner*, the Second Circuit held that, "The proper inquiry is whether the state acted *reasonably* in selecting means likely to inform persons affected, not whether each property owner actually received notice. As long as the state employs means 'such as one desirous of actually informing the [property owner] might reasonably adopt to accomplish [that purpose],' *Mullane*, *supra* at 315, then it has discharged that burden. . . . Importantly, the state's obligation to use notice 'reasonably certain to inform those affected' does not mean that all risk of non-receipt must be eliminated." *Weigner*, *supra* at 649.

Therefore, the appropriate test is whether the County's methods were reasonably calculated to reach the intended recipient, *not* whether notice was actually received. *Jones*, *supra* at 226, *Mullane*, *supra* at 314, *Dusenbery v. United States*, 534 U.S. 161, 168-9 (2002). Were that not the case, a delinquent

taxpayer could defeat a foreclosure action simply by denying notice. Clearly, an otherwise valid foreclosure action should not be so easily frustrated.

Although the Petitioners rely heavily upon *Jones v. Flowers*, *supra*, it is questionable whether *Jones* even applies to this case. At most, *Jones* only concerns the State's obligation when a foreclosure Notice is returned as "unclaimed" and the State learns that its attempt at notice has *failed*. In *Jones*, the Supreme Court stressed that they were not deviating from well-settled principles of notice established in *Mullane*, *supra*, and *Dusenbery v. U.S.*, 534 U.S. 161 (2002). *Jones, supra* at 238. In *Jones*, the Supreme Court found a denial of due process only because the State did nothing further after learning that the Notice had been returned.

In the present matter, the Notice was not returned, and the County received *confirmation* of delivery, *not* notice that delivery had failed. Under standard Postal Service procedures, if the foreclosure Notice is unclaimed or undeliverable, the entire Petition would have been returned to the County, bearing such a marking. The return of the receipt alone reflected that delivery had taken place. That receipt also contained a mark in the signature line, not dissimilar to the illegible scrawls on the Tupazes' prior foreclosure receipts. Finally, the County checked the Postal Service "Track and Confirm" website and received confirmation of the specific date and time of delivery. The first time the County learned that there was some question about delivery was when Mr.

Tupaz called the County for the first time, more than one month after the foreclosure had taken place. Unlike *Jones*, this is not a matter where the County learned that its efforts at providing notice had *failed*; to the contrary, the County learned that its efforts had **succeeded**.

The *Jones* Court concluded that "the constitutionality of a particular procedure for notice is assessed *ex ante,* rather than *post hoc*." *Jones, supra* at 231. The Court went on to hold that, "if a feature of the State's chosen procedure is that it promptly provides additional information to the government about the effectiveness of notice, it does not contravene the *ex ante* principle to consider what the government does with that information in assessing the adequacy of the chosen procedure." *Jones, supra* at 231.

Thus, the Second Circuit correctly determined that the focus in this case was "whether the County *thought* that the Tupazes had received notice." *Luessenhop/Tupaz v. Clinton County*, 466 F.3d 259 (2d Cir. 2006). In doing so, this Court correctly acknowledged that the focus is upon the *sender*, not the recipient, and whether the *sender* reasonably believed that its efforts at delivery were successful. Upon remand, the County presented Affidavits and testimony from the Treasurer regarding the steps that they took to verify delivery and confirming that the County was not aware of any evidence to suggest that it was not, in fact, received. Following the remand, the Second Circuit correctly noted that the Treasurer

was not aware of any other factor that might have suggested a failure to receive the Notice. *Miner/Tupaz v. Clinton County*, 541 F.3d 464, 468 (2d Cir. 2008). The Tupazes presented no proof to the contrary, other than to again echo their own conclusory denials of receipt. There is still simply *no evidence* that the Notice was not, in fact, received. Thus, the Second Circuit properly concluded that despite the Petitioners' denial of notice, "there is *no dispute* that defendants believed that it had been delivered." *Miner/Tupaz*, *supra* at 468.

Once the Notice was delivered to the correct address pursuant to standard office procedures, the County received back a receipt, and the County had verified delivery through the Postal Service, the County was under no obligation to do anything further.[2] Since *Jones*, courts have consistently upheld notice, despite a plaintiff's denial of receipt, where the sender receives confirmation of receipt.

In *Centeno v. U.S.*, 2006 WL 2382529 (S.D.N.Y. 2006), a seizure notice was sent to a prisoner by certified mail. Although the government received a receipt signed by someone at the facility, the plaintiff apparently denied receipt. This Court concluded that notice was sufficient and that no further notice was

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[2] Several cases have supported the use of the USPS "Track and Confirm Service" to prove sufficient notice. See: *Griggs v. JP Morgan Chase*, 2007 WL 43781 (S.D. Tex. 2007), *Blomeyer v. Levinson*, 2006 WL 463503 (E.D. Pa. 2006).

required, since the government did receive proof of receipt and never received any information that the plaintiff *hadn't* received it.

In *United States v. Sodders*, 2006 WL 1765414 (N.D. Ind. 2006), notice of acceleration of a loan was served by certified mail and signed for by the plaintiff's husband. She later claimed that she did not receive the notice and that her husband was not authorized to accept it. The Court noted that actual receipt was irrelevant, and that since the government received proof of receipt, due process had been satisfied.

The matter of *Estate of Riley*, 847 N.E.2d 22 (Ohio 4th Dist. 2006) specifically concerned the issue of an unsigned certified mail receipt. The proof reflected that a probate court notice was sent to the plaintiff by certified mail. Several days later, the green return receipt was returned without a signature, but bearing a stamp showing the date of delivery. Post Office records reflected the date of delivery. The Post Office was ultimately able to locate a separate receipt signed by plaintiff's son. Although the plaintiff denied receipt and maintained that her son lacked authority to sign for her mail, the court determined that considering the circumstances, notice was sufficient. Significantly, the court noted that, to the extent that the Post Office failed to follow its own internal procedures for certified mail, "that is the misfeasance of the Post Office, not the (sender)." *Id.* at 28.

The cases cited by the plaintiff are quickly distinguishable. The case of *Collette v. United States*, 247 Fed. Appx. 87 (9th Cir. 2007), concerned numerous notices of administrative forfeiture sent by the DEA. The Court found notice deficient due to a number of problems, including return of several notices as undeliverable, and return of one unsigned receipt. The Court's concerns were based upon the extensive deficiencies, *not* the single unsigned card. That same extent of alleged deficiencies does not exist in the present matter.

Similarly, in *Tu v. National Transportation Safety Board*, 470 F.3d 941 (9th Cir. 2006), the proof reflected a long and extensive history of returned and unclaimed certified mailings. The court held that notice was insufficient because, based upon that past history, the FAA should have known that Tu only accepted first-class mail. Once again, that history does not exist in the present case. The County had no reason to believe that Tupaz would not receive certified mail. In contrast, as noted above, in prior foreclosures, someone at the plaintiff's residence had signed and returned certified mail receipts.

Similarly, in *Rodriguez v. DEA*, 219 Fed. Appx. 22 (1st Cir. 2007), notice was rejected because the government knew that the plaintiff was incarcerated and had recently signed for other mail at another prison.

As near as can be determined, *no court* of any jurisdiction has held that due process requires that a certified mail receipt must be signed in order to

satisfy due process. Similarly, *no court* has required that notice must be remailed when a sender receives an unsigned certified mail receipt or, as here, when a sender receives *confirmation* of delivery.

The following cases cited by the Petitioners do not stand for the proposition that a *signed* receipt is required in order to establish due process. *Taylor v. The Stanley Works*, 2002 WL 32058966 (E.D. Tenn. 2002) (Notice rejected because there the receipt was returned without any date or signature, and the Post Office was unable to identify the date of delivery); *Moore v. Dunham*, 240 F.2d 198 (10th Cir. 1956) (Notice under the Oklahoma Non-Resident Motorist Act rejected where no return receipt was received at all); *Fortney v. Petron*, 1992 WL 266191 (E.D. La. 1992) (regarding former FRCP 4(c)(2)(C)(ii), which specifically required a signed acknowledgment of receipt); *Winfield v. C&C Trucking*, 2003 WL 21749610 (S.D.N.Y. 2003) (concerning New York Vehicle and Traffic Law § 253, which specifically required a signed receipt); *Chiadez v. Gonzales*, 486 F.3d 1079 (9th Cir. 2007) (regarding a statute that specifically required that an Order to Show Cause for an immigration hearing must be signed for by the recipient.) In contrast to the cases cited by Petitioners, the New York Real Property Tax Law does not contain a requirement that the return receipt be signed.

In contrast to the Petitioners' claims, the "Form 3849" is *not* a required form, and does not even apply in this case. That is merely the form the mail carrier leaves to advise a recipient who is not at home that

they attempted delivery of a certified article and that it can be redelivered or retrieved at the Post Office.

In contrast to the Tupazes' arguments, due process does *not* require a signature on the certified mail receipt. Were that the case, one could escape any foreclosure – or *any* matter of any kind involving service by certified mail – simply by making an illegible mark and later denying that it is his or her signature. Clearly, the Legislature did not intend that the statute be so easily frustrated. All that matters is that it was indeed delivered and received by *someone* at the home. By ensuring proper delivery through the required method, the County satisfied due process.

Finally, any alleged deficiency is overcome by the Tupazes' complete failure to make an inquiry into the status of a foreclosure action. As noted in *Weigner supra*, "A second reason for tolerating the risk of non-receipt. . . . is (the plaintiffs') own conduct in failing to pay taxes. The well-known inevitability of taxes and the consequences of not paying them are themselves likely to alert a tax delinquent property owner to the possibility of foreclosure. . . . A person in Weigner's position can reasonably be expected to know that foreclosure is imminent and to take the steps necessary to protect her interests." *Weigner*, *supra* at 651.

Obviously, ownership carries responsibilities and delinquent taxpayers themselves have an obligation to investigate whether a foreclosure proceeding has been commenced, as the inevitability of a foreclosure proceeding is so well-known. The Tupazes received

numerous prior letters and warnings. Although they were provided with ample opportunity to avoid a foreclosure, they took no steps to pay their back taxes or to inquire whether a foreclosure action had been instituted. To permit the Petitioners to recover under these circumstances would permit them to benefit from their own acquiescence and knowing disregard of the prior warnings that they had been provided.

CONCLUSION

As a result, the Respondents respectfully submit that this Court should deny Petitioners' request for Writ of Certiorari and that the well-reasoned Decision of the Second Circuit should be allowed to stand.

Dated: February 12, 2009

Respectfully submitted,

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